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No. 99-699

Supreme Court, U.S.
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In The

Supreme Court of the United States

Boy Scouts of America, *et al*,
Petitioners,

v.

James Dale,
Respondent

On Writ of Certiorari to the
Supreme Court
for the State of New Jersey

BRIEF OF THE LIBERTY LEGAL INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a state law requiring a Boy Scout Troop to appoint an avowed homosexual and gay rights activist as an Assistant Scoutmaster responsible for communicating Boy Scouting's moral values to youth members abridges First Amendment rights of freedom of speech and freedom of association.

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INTEREST OF THE AMICUS CURIAE[1]

Amicus Liberty Legal Institute is a legal organization specializing in the defense of religious freedoms and First Amendment rights. In its commitment to the protection of religious liberty of all faiths, the Institute represents religious institutions and individuals across the country. These rights and liberties are directly threatened by the New Jersey Supreme Court's imposition of state approved viewpoint regarding the morality of the homosexual lifestyle upon a voluntary association expressing a contrary viewpoint. If the State is allowed to supercede a voluntary association's right to define itself according to its own moral conscience, then all institutions, including religious organizations, are at substantial risk. Since the State's interest at issue before the Court is arguably neutral and of general applicability, religious institutions would have no protection under the Free Exercise Clause. The determination of this case therefore implicates religious freedom at its core. As an organization committed to the defense of religious liberty, therefore, the Institute has an exceptional interest in the continuing vitality of associational liberty as a bulwark against violation of religious freedom.

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[1]The parties have consented to the filing of this Brief. Letters of consent from Petitioner and Respondent accompany this Brief. This brief has not been authored in whole or in part by counsel for a party. No person, other than amicus, its members or its counsel, has made a monetary contribution to the preparation of submission of this brief.

STATEMENT OF THE CASE

Amicus hereby adopts the statement of the case presented in the Brief for Petitioners.

SUMMARY OF ARGUMENT

The Boy Scouts of America, although large, is a voluntary association with defining characteristics and principles similar to large religious organizations. Petitioners did not deny Mr. Dale a leadership position because he was a homosexual, but because he openly advocated a homosexual lifestyle before impressionable boys which was deemed contrary to Petitioners' particular viewpoint.

If the State is allowed to require a voluntary association to suppress its viewpoints, moral or otherwise, in favor of the State approved opinion *du jour* and to override a voluntary association's right to determine the content of its own speech, there could be serious consequences for the religious freedom of all religious institutions and associations. Any such State "interests" are arguably neutral and of general applicability, and would operate to require all religious institutions to abandon their religious conscience in favor of the State approved speech. An adverse ruling against Petitioners in this case could well begin a movement down the long, slow road of abandoning, slowly but surely, the freedom of religious organizations to define themselves.

ARGUMENT

I. There is no essential difference between the Boy Scouts of America and any large religious denomination or organization.

People organize together for a variety of reasons, including fraternal, charitable, and religious. This right of association is an essential element of the fundamental freedoms which form the bedrock of our constitutional compact.

> "... [W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. United States Jaycees*, 468 U.S. 609, 622, 104 S. Ct. 3244, 3252, 82 L.Ed. 2d 462 (1984)

Assuming, arguendo, that the Boy Scouts of America is not a "religious" association, it has many associative and organizational elements similar to religious organizations, as demonstrated by the following:[2]

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[2]For the "Generic Denomination," counsel has adopted the Episcopal Church as a model and has quoted from *The Book of Common Prayer* of The Episcopal Church, Copyright 1979, abbreviated in the Table as BCP. Because pronouncements of the Episcopal Church are, however, contained throughout several sources, these quotations and the use of the Episcopal Church as a model are illustrative only and are not intended to represent the official position of the Episcopal Church toward any of the matters presented.

Characteristic	Boy Scouts of America	Generic Religious Denomination
Size	Large	Large
Organization	National, with Council (Regional) Supervising Structure, Local Troops	National, with Diocesan (Regional) Supervising Structure, Local Churches
Openness to Public Participation	Invites all, but expects willingness to adhere to standards	Invites all, but expects willingness to adhere to standards
Written Statements of Beliefs	Scout Oath, Scout Law	Catechism, Nicene Creed and Apostles Creed
View Toward God	"duty to God" (Oath), as taught by family and religious leaders (explanation)	made in God's image, Father, creator; duty to God is to "believe and trust in him" (BCP 847)
Method of Teaching	Lecture, discussion, and demonstration by example	Lecture (sermon), discussion, and demonstration by example

Characteristic	Boy Scouts of America	Generic Religious Denomination
Collection of Beliefs	Boy Scout Handbook	Bible
Daily Values	"morally straight" (Oath), strong character, honesty, purity, justice, respect, clean, faithful, virtuous, self-reliant (explanation)	set forth in Ten Commandments, to demonstrate respect, be faithful (love and obey God), honesty, resist temptation (see BCP 847-848)

These common characteristics are expressive in that they represent and promote a particular viewpoint, way of thinking, and approach to life.[3]

For associational purposes, therefore, there is little, if anything, to separate the Boy Scouts of America from any large religious group.

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[3]Thus, it has been recognized that "[e]ven the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement." *Roberts v. United States Jaycees*, 468 U.S. 609, 636, 104 S. Ct. 3244, 3259-60, 82 L.Ed. 2d 462 (1984) (O'Connor, J., concurring)

II. If New Jersey is allowed to require acceptance and promotion of a particular viewpoint and to override the Boy Scouts of America's associational rights, it would have serious consequences for all religious institutions since the law being applied is arguably neutral and of general applicability.

In *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L.Ed. 2d 876 (1990), this Court held that the State could enforce laws against religious institutions without regard to the Free Exercise Clause if the laws were neutral and of general applicability. Therefore, if a State passes a neutral law of general applicability which challenges a religious institution's right to define itself in membership, leadership, or in public proclamation of opinion, the religious institution cannot rely upon the Free Exercise Clause but must, instead, rely upon its rights under the First Amendment protecting its and its members' freedom of association. Without the protection of the Free Exercise Clause and free speech associational rights, religious organizations stand defenseless against such a challenge.

No one has alleged (and no one could allege) that New Jersey has passed a law regarding homosexuals which is specifically targeted against the Boy Scouts of America. Instead, Respondent attempts to enforce an anti-discrimination law against Petitioners which is arguably a neutral law of general applicability, applied in a manner to require Petitioners to accept, permit, and, because of the context, participate in promoting viewpoints to impressionable youth with which it fundamentally disagrees.

Just as in the present case, most States will always present their "interest" in a neutral fashion, not aimed specifically at religious institutions. Without freedom of association protection from such "neutral" laws, religious institutions will be unshielded from the power of the State to dictate the very language and concepts used by those institutions to define themselves and their particular religious, moral, and political perspectives.

Such attempts are already being made. An instructive reported case in this regard is *Hsu v. Roslyn Union Free School District No. 3*, 85 F.3d 839 (2nd Cir.), *cert. den.* 519 U.S. 1040, 117 S.Ct. 608, 136 L.Ed.2d 534 (1996). In this case, a student Christian group attempted to form a Christian club at school. In its proposed club constitution, the club stated that it would be open to all people "regardless of race, color, age, religion, sex, national origin, or physical handicap," but that the meetings would be gatherings of "Christians" and that elected officers (the leadership) would have to be "professed Christians." *Id.* at pg. 849. The school insisted that the club's constitution be changed to delete the word "Christian" and to remove any requirements that the club officers profess any particular faith, and then denied the club status when the club refused to make the changes because the requirement that the club's leadership be "professed Christians" constituted a violation of the school's anti-discrimination regulations. *Id.* at pg. 850. The club was subsequently granted permission to organize, but only on the condition that it remove the requirement that officers be Christian. *Id.* at pg. 851.

The District Court denied the club organizers' requests for relief, relying heavily upon *Smith*.[4] The District Court was reversed on appeal by the Second Circuit, but not based upon Free Exercise rights. Instead, the Court focused upon associational free speech rights in the context of the Equal Access Act. *Id.* at pgs. 856-859. Had it not been for the influence of freedom of association, the State would have been able to impose its own statement of values and constitution upon the "Christian" club, applying its "neutral" regulation of general applicability.

The Plaintiffs in *Hsu* are not alone. Amicus has represented in just the last year a college religious student association which was prohibited by a major university from having a Statement of Faith signed by its members because such a requirement allegedly violated the college's neutral regulation prohibiting discrimination based upon religion.

These two cases are but the tip of the iceberg, waiting to emerge if associational liberties are further weakened. Once the State is allowed to require a voluntary association to suppress its viewpoints, moral or otherwise, in favor of the State's approved opinions and is allowed to override a voluntary association's right to determine the content of its own speech, religious freedom of all religious institutions and associations is in jeopardy.

Ultimately, this case is about freedom of conscience, a concept crucial to religious liberty. Freedom of conscience is

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[4]876 F.Supp. 445, 462 (E.D.N.Y. 1995)

powerful. It is in fact a major reason for the existence of our religion clauses.

Removing associational protection from a religious landscape which already has no protection from neutral and generally applicable laws would be a mistake. Religious institutions would be forced to choose between following the State or their religious conscience, their God or their government. Historically, upon such choices have governments fallen.

The better approach is to respect freedom of conscience and allow a diversity of private groups, including religious groups, to flourish without State interference. Upon this fundamental freedom has this country risen to become a beacon for the world.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Brief of Petitioners, the decision below should be reversed.

Respectfully submitted,

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